Supreme Court, U.S.
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In the

Supreme Court of the United States

CECG, INC.,

Petitioner,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 2-207 of the Uniform Commercial Code "knock out" conflicting provisions in form agreements exchanged between a buyer and a seller of goods?

LIST OF PARTIES TO THE PROCEEDING

In accordance with Rule 29.6, Magic Software Enterprises, Inc. is a wholly owned subsidiary of Magic Software Enterprises, Ltd., which is publicly traded.

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BASIS FOR SUPREME COURT JURISDICTION

The Judgement and mandate of the United States Court of Appeals for the Third Circuit was issued on November 27, 2002. The basis for jurisdiction in this Court is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Uniform Commercial Code Section 2-207 provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

STATEMENT OF THE CASE

Plaintiff CECG, Inc. is a computer consulting firm which sells and creates computer software, among other products. Magic is computer software which creates other software. It was developed by defendant Magic Software Enterprises, Ltd., an Israeli corporation. It is sold in the United States by its wholly owned subsidiary, Magic Software Enterprises, Inc.[1] Magic is sold in two components which are purchased separately, a "development engine", which works to create the software which the developer is writing, and a "run time" or deployment module, which allows the created software to operate on a computer without being able to be modified by the user. (Pet. App. B, 16a to 17a)

CECG first purchased Magic version 2.5 in 1988. The initial price for the development engine software was $199. At that time, Magic was offered with offered two versions of the runtime module. The per-user runtime could be purchased for approximately $59, but used for only one end user, and an unlimited runtime which cost $699, but could be used for an unlimited number of end users. CECG claims that when it initially purchased Magic, the alesman promised that, in the future, whenever he purchased an upgrade of its development engine software, it would receive a free unlimited runtime upgrade, essentially a "buy one, get one free" offer. It was CECG's belief that the original offer to include a free unlimited runtime upgrade with an upgrade of the development engine entitled it to free unlimited runtime upgrades in perpetuity. (Pet. App. B, 17a)

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[1] The two Magic Software Enterprises entities are referred to as "MSE". For purposes of this petition, it is not necessary to distinguish between the two.

In June 1993, MSE discontinued offering the unlimited runtime product, and only offered a single-user runtime. As a result of this and other perceived wrongs by MSE, CECG filed suit, alleging a multitude of theories. That action was dismissed on summary judgment, primarily because the alleged promise of "buy one, get one free" software was not in writing and, thus barred by the statute of frauds. (Pet. App. B, 17a to 18a)

The parties had no further contact until September 1999. At that time, CECG had a client who needed an update to a Magic-based product CECG had written for it in the early 1990s. Mitch Geier, CECG's owner, contacted MSE and spoke with a salesperson, Kelly Urschel. Ms. Urschel faxed to Mr. Geier a number of items, which included a description of MSE's current products, a price list, and copy of MSE's standard software license agreement. An unlimited runtime license was not among the products offered for sale. MSE's form license agreement provided, *inter alia*:

> a. Use the Product as licensed with respect to the number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified in the Product package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the number

> of users permitted you should immediately contact MSE.

(Pet. App. B, 18a). MSE's form license agreement also provided:

> If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. . . . Only if you accept each of these terms below should you open this package and use the enclosed Product.

(Pet. App. B, 18a). MSE's form license agreement further had a venue provision, that the exclusive venue for any dispute would be in the state or federal courts in Orange County, California. *(Id.)*

After reviewing these documents, Mr. Geier asked Ms. Urschel to send him a demonstration copy of the software. Along with the demonstration copy of the software, Mr. Geier also received codes which allowed him to use the software on the CD on a free trial basis. Those codes allowed the software to run through December 31, 1999. (Pet. App. B, 19a)

In early January 2000, Mr. Geier decided to purchase one of MSE's products. He again contacted Ms. Urschel about the purchase, and Ms. Urschel sent him another price list. An unlimited runtime license was not among the items on the price list. When he placed the order, Ms. Urschel asked Mr. Geier for a credit card, but he refused. According to Mr. Geier, he told Ms. Urschel that he wanted to send a check along with a purchase order, and that the purchase had to be subject to his terms and conditions. Thereafter, Mr. Geier sent a

Purchase Order dated January 10, 2000 to MSE for one copy of its Development Universal Client Server for $3,600, plus one year of technical support for $880. Along with the purchase order, he enclosed a check for $4,480.00 for this software. The back of the purchase order contained a number of terms, including the following:

> This order shall also reinstate the buyers [sic] understanding of the unlimited runtime license. The seller shall update and upgrade the unlimited runtime license currently called deployment without charge to buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed products so that the licensed versions and names shall match shall match [sic]. This reinstatement shall be irrevocable. Further the seller agrees to continue selling the development tools and support/support agreements to the buyer at the current going rate or a discounted rate that is applicable. This supersedes all past and future shrink-wrap licensing agreements. The buyer shall not be required to disclose its [sic] and the seller shall not seek to deal directly with a client of the buyer.

(Pet. App. B, 20a to 21a) CECG's form contract contained a provision which provided for the venue of any disputes to be in New Jersey Superior Court in Middlesex County. (*Id.*).

Ms. Urschel shipped an additional copy of the software CD, along with an additional copy of MSE's

form license agreement to Mr. Geier, but Mr. Geier pointed out to her that all he needed was the key to reactivate the demo software which he already had on his computer. Ms. Urschell then faxed to Mr. Geier the Product Authorization Key to allow the development software which CECG had purchased to operate for an unlimited time. The Product Authorization Key provides that "The PAK is an integral part of the licensed software product identified on the front of this document ("The Software") and is provided subject to the license terms applicable to the software." (Pet. App. B, 21a)

In March 2000, Mr. Geier again contacted MSE, now demanding his free unlimited runtime license. Mr. Geier wrote to Ms. Urschel demanding the unlimited runtime license. Mr. Geier was referred to Tammy Meyer, the East Coast account representative. Ms. Meyer spoke with Russell Taitz, Vice-President of Operations for MSE. This was Mr. Taitz' first hearing of CECG's claimed entitlement to a free unlimited runtime license. He and Ms. Meyer called Mr. Geier in response to his demand for the unlimited runtime license. Mr. Taitz offered to return CECG's money, but declined to provide Mr. Geier a free unlimited runtime license. (Pet. App. B, 22a; (Pet. App. A, 7a)

Immediately thereafter, this action was filed in the Superior Court of New Jersey, Chancery Division, Middlesex County, on April 12, 2000 along with an Order to Show Cause seeking a preliminary injunction obligating MSE. to provide free software to CECG. In its Complaint, CECG sought specific performance of the terms contained on the back of its Purchase Order which purported to require MSE to provide a free upgrade for its unlimited runtime software, and to eliminate "time bombs" which allegedly were contained

in the software CECG had purchased from MSE. CECG further alleged that MSE's failure to honor the foregoing provision also constituted a violation of the New Jersey Consumer Fraud Act.

MSE removed the action to the United States District Court for the District of New Jersey on May 10, 2000 pursuant to 28 U.S.C. §1441, based upon diversity jurisdiction, since the amount in controversy exceeded $75,000 and CECG is a New Jersey corporation, while Magic Software Enterprises, Inc. is a California corporation and Magic Software Enterprises, Ltd. is an Israeli corporation.

Thereafter, CECG moved to remand the case back to the Superior Court. It offered to stipulate that its money damages would not exceed $50,000 and sought to enforce an exclusive venue provision contained in the purchase order for the software in issue. The District Court denied the motion to remand. (Pet. App. C, 41a to 54a). Although CECG had offered to stipulate that its damages would not exceed $50,000, the District Court held that the amount in controversy requirement of 28 U.S.C. § 1332(a) was satisfied because of the value of the software which CECG sought to receive by way of a mandatory injunction. The District Court further held that the venue provision contained in CECG's purchase order was "knocked out" by a contrary venue provision contained in MSE's license agreement. In the absence of a venue provision in the contract between the parties, venue was appropriate in the District Court. (*Id.*)

The parties then proceeded with discovery. After the close of discovery, the parties filed cross-motions for summary judgment. In addition, CECG filed a Motion for Consideration (sic) pursuant to New Jersey L.Civ.R.

7.1(g) requesting that the District Court change its decision denying CECG's motion for remand, based upon facts developed during discovery. MSE's motion for summary judgment was granted and CECG's claims were dismissed. CECG's motion for reconsideration of the District Court's denial of its motion for remand was denied because it was untimely and because it did not contain matters which the Court had "overlooked", as required by New Jersey L.Civ.R. 7.1(g), as it was based upon discovery taken after the remand motion had been decided. (Pet. App., 15a to 40a).

CECG thereafter timely filed an appeal. The United States Court of Appeals for the Third Circuit affirmed the decisions and judgment of the District Court, for substantially the same reasons relied upon by the District Court. (Pet. App. A, 1a to 14a). CECG filed a petition for rehearing, which was denied by way of Order dated November 19, 2002. (Pet. App. D, 55a to 56a). MSE's motion for damages pursuant to F.R.App.P. 38 was denied by way of Order dated November 20, 2002. The Judgement and mandate of the Court of Appeals was issued on November 27, 2002.

CECG'S PETITION FOR CERTIORARI SHOULD BE DENIED

CECG raises a number of issues here, all of which revolve around the application of UCC Section 2-207 to the particular form agreements exchanged between the parties. None of the considerations set forth in Sup.Ct.R. 10 are applicable to this case.

Sup.Ct.R. 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeal on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, none of those considerations apply. Indeed, no issues of federal law are presented, important or otherwise The issues in the instant case are governed by the Uniform Commercial Code, which is state contract law. CECG is attempting to manufacture federal questions because it is dissatisfied with the decisions of the Court of Appeals and the District Court. For example, its contention that it was denied its Seventh Amendment right to a jury trial because summary judgment was granted below is wholly frivolous. *See* WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2714 (discussing decisions upholding 7th Amendment challenges to summary judgment). By CECG's own admission, the errors it claims were made below are either erroneous factual findings or the misapplication of a properly stated rule of law to the peculiar facts of this case.

The issues here are governed by Section 2-207 of the Uniform Commercial Code. At common law, there could be no meeting of the minds, and thus no contract, unless the parties agreed on all terms of the contract. *E.g., Richardson v. Union Carbide*, 347 N.J.Super. 524,

533 (App. Div. 2002). Article 2 of the Uniform Commercial Code was designed to jettison the "mirror image rule" to recognize the existence of a contract even though certain terms remained in conflict or unresolved. *Id.* "N.J.S.A. 2A:2-207 was enacted to reform the common law mirror-image rule and reject the last-shot doctrine[2] which accorded undue advantage to the mere order in which forms were sent." *Id.* at 534.

Section 2-207 of the UCC determines which, if any, conflicting terms in the parties' respective forms become part of the contract. "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the bargain, they will not be included unless expressly agreed to by the other party." UCC § 2-207, Comment 3. A clause which would "materially alter" the contract is one which would result in "surprise or hardship if incorporated without express awareness by the other party." *Id.* Comment 4. "One of the main purposes of UCC § 2-207 is to facilitate oral contracts that are usually negotiated over the telephone and only later reduced to a writing. In particular, UCC § 2-207 is designed to serve as a way of dealing with conflicting or additional terms that were never a part of the bargaining process." *Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 288 (3d Cir. 1993). "In other words, terms governed by UCC § 2-207 are those terms that were never expressly agreed upon; rather they appear only later as non-negotiated terms in confirmatory memoranda or other types of business

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[2] The "last shot rule" essentially provided that the terms of the last document exchanged between the parties governed the transaction. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 99 (3d Cir. 1991).

forms purporting to 'confirm' what was previously discussed orally". *Id.*

When terms in the two parties forms contradict each other, there is a "mutual knockout" of the conflicting terms and, to the extent necessary, the missing terms are provided by gap fillers in the UCC. *E.g., Richardson, supra.; Northrop Corp. v. Litronic Industries*, 29 F.3d 1173, 1178-1179 (7th Cir. 1994); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984)(discussing authorities). When clauses on the parties' respective forms conflict, each party is deemed to object to the contrary term in the other's form and, as a result, the contrary terms do not become part of the contract. UCC § 2-207, Comment 6.

> The UCC, in § 2-207, rejected [the last shot rule]. Instead, it recognized that, while a party may desire the terms detailed in its form if a dispute, in fact, arises, most parties do not expect a dispute to arise when they first enter into a contract. As a result, most parties will proceed with the transaction even if they know that the terms of their form would not be enforced. The insight behind the rejection of the last shot rule is that it would be unfair to bind the buyer of goods to the standard terms of the seller, when neither party cared sufficiently to establish expressly the terms of their agreement, simply because the seller sent the last form. Thus, UCC § 2-207 establishes a legal rule that proceeding with a contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either

> add to, or differ from, the terms detailed in the parties' earlier writings or discussions. In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC.

Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 99 (3d Cir. 1991).

The issues raised here by CECG presuppose that the terms of its Purchase Order govern the transaction between it and MSE, rather than addressing the issues argued and decided below: whether the terms of CECG's Purchase Order in fact became part of the bargain between parties by virtue of the operation of UCC § 2-207.

First, CECG contends that the federal courts had no jurisdiction over its claims against MSE because of the venue provision in its Purchase Order. It ignores the fact that MSE's form agreement had a contrary venue provision. By operation of § 2-207, those contrary provisions are "knocked out". Thus, there is *no* venue provision governing the transaction. The courts below correctly came to the same conclusion and found that the case was properly in the federal courts.

CECG argues that the Court of Appeals erroneously made new findings of fact with respect to the terms of its Purchase Order. Even assuming this were true, this is not a basis for granting certiorari. At worst, the Court of Appeals misread the terms of the Purchase Order. This does not give rise to any

important federal statutory or constitutional issues. It is simply claimed erroneous factual findings or the misapplication of a properly stated rule of law in this particular case.

However, the Court of Appeals' decision was correct in any event. The Court of Appeals did not make a factual finding that CECG's Purchase Order said something that it didn't, or didn't say something that it did. The Court of Appeals accurately quoted the terms of the Purchase Order. (*Compare* Pet. 19 *with* Pet. App. A, 6a, n. 4). The claimed error is whether the language of the Purchase Order "expressly limits acceptance to the terms of the offer" for purposes of UCC § 2-207(2)(a). That is a *legal* finding, not a *factual* finding. While CECG's Purchase Order contained language that its terms superceded any contrary language, the Court of Appeals found it did not *expressly* condition acceptance upon the terms of the offer. Moreover, even if it had expressly conditioned acceptance upon the terms contained in it, the provision regarding receipt of free runtime software in perpetuity "materially alter[ed]" the terms of MSE's writings because it changed the quantity term. By operation of UCC § 2-207(2)(b), CECG's attempt to receive free runtime software in perpetuity does not become part of the contract between the parties. Further, MSE's own form license and confirmatory invoices contained contrary terms, which, by the operation of UCC § 2-207(2)(c), act as an objection to the provision on the back of CECG's Purchase Order entitling it to free runtime software in perpetuity. Thus, in no event does that term become part of the agreement. It is "knocked out" by contrary terms in MSE's forms.

Clearly, issues raised herein are governed by contract law and the Uniform Commercial Code, not by

important federal questions. There is no conflict among the Circuits, or among state courts of last resort, with respect to an important question of federal law, nor does this case raise an important question of federal law which has not been, but should be settled by this Court. Rather, the purported errors identified by CECG are simply erroneous factual findings, or the misapplication of a properly stated rule of state law, which, in fact, are correct. There is no reason for the Court to grant CECG's petition for certiorari. In short, its petition is frivolous. Therefore, MSE respectfully requests that CECG's petition be denied and that it be awarded damages in accordance with Sup.Ct.R. 42.

CONCLUSION

For the reasons set forth herein, CECG's petition for certiorari is frivolous and should be denied.

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